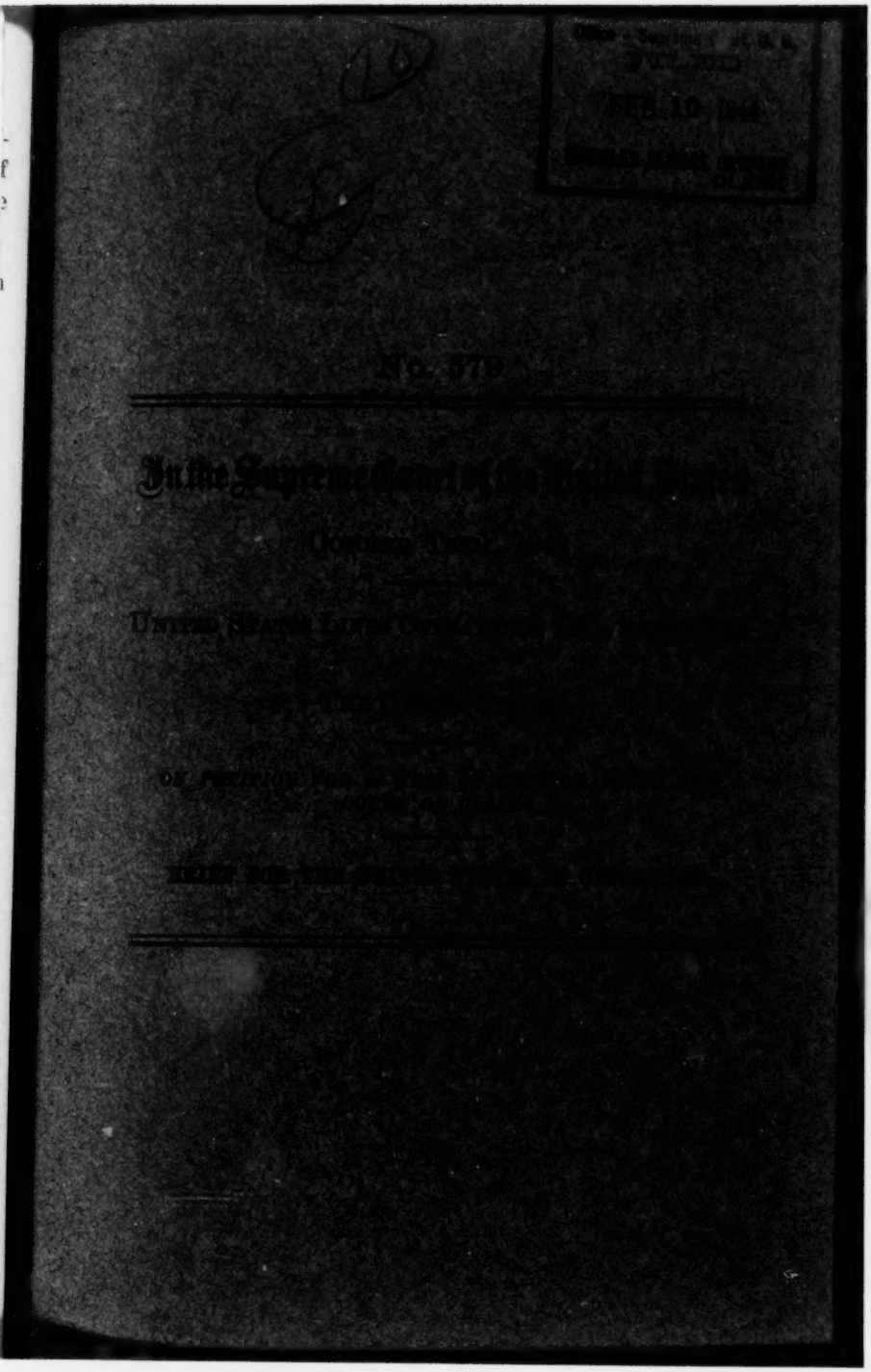

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572631—44

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 579

UNITED STATES LINES OPERATIONS, INC., PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The findings of fact (R. 24–66), conclusion of law (R. 67), and opinion of the Court of Claims (R. 67–72) are not yet officially reported..

JURISDICTION

The judgment of the Court of Claims was entered June 8, 1943 (R. 72). Petitioner filed a motion for a new trial on August 6, 1943, which was overruled on October 4, 1943 (R. 73). The petition for a writ of certiorari was filed January 4, 1944. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTION PRESENTED

Whether the Court of Claims correctly interpreted a transportation contract between petitioner and the United States, as requiring that the prescribed discount for out-of-season sea voyages, admittedly applicable where both the eastbound and westbound passages occur out of season, must also be granted on the off-season half of round-trip voyages made half in and half out of season.

STATEMENT

The following facts, found by the court below, are relevant to the narrow question on which the petition is predicated, *viz,* the proper construction to be given the discount provision in petitioner's tariff:

The Act of March 2, 1929 (45 Stat. 1508)[1] authorized the Secretary of War "to arrange for pilgrimages to cemeteries in Europe" at the expense of the United States, by the mothers and widows of members of the armed forces who died in the last war and were interred abroad (R.24). The Secretary of War was authorized to investigate the probable cost of such pilgrimages and report thereon to Congress by December 15, 1929.

Pursuant to this authorization, officials in the Office of the Quartermaster General conferred with officers of petitioner with a view to ascer-

[1] The Act was amended on April 19, 1930 (46 Stat. 225), in particulars not here relevant.

taining the costs of such pilgrimages (R. 25). On June 19, 1929, petitioner wrote to the Quartermaster General concerning a proposed plan for the transportation of the mothers and widows, stating (R. 25–26):

> * * * from the standpoint of economy to the government * * * it would be much better if their transportation could be provided in what is termed the "off-season" when a 10% reduction is available. * * *
>
> If travel is one way in off-season and one way in height of the season, the 10% reduction is applicable on one-half of the fare.[2]

The 10% reduction on round-trip fares referred to in the letter was subsequently changed to 12% (R. 28). Negotiations continued, the Quartermaster General desiring more information as to the number of travellers before entering into any commitment (R. 28). Several other proposals, differing in particulars not here relevant, were submitted by petitioner (R. 28–31, 32–35, 38), culminating in an agreement of March 29, 1930

[2] During the years 1929 and 1930, petitioner was a member of the Trans-Atlantic Passenger Conference which had agreed in 1929 to institute as a trial "round-trip rates with a reduction of 10% from the combined one-way fares for travel" east-bound between August 16th and May 15th, and west-bound between October 16th and July 15th (R. 5, 19, 20, 53, 70, 86). Petitioner's letter of June 19, 1929, specified these dates as off-season, but the dates were subsequently altered somewhat (R. 53–54, 87–90).

(R. 43–48), accepted by the United States on April 9, 1930 (R. 48).

In that agreement, petitioner undertook to provide cabin-class accommodations on its vessels for transportation of mothers and widows "at tariff rates for the accommodations occupied east- and west-bound" (R. 43). The tariff rates referred to were those contained in a folder issued by petitioner, dated January 1, 1930, which was stated to cancel all previous issues (R. 53, 73–85). This folder set forth two sets of rates (both east- and westbound), one for the summer and one for the winter or "off-season" (R. 52), and provided in a footnote that "Round trip rates apply during 'off-season'—Eastbound, July 16th to May 15th, inclusive; Westbound, Oct. 1st to July 31st, inclusive. Round trip rate for berths above minimum is made by deducting 12% from combined Eastbound and Westbound fares" (R. 52, 76, 79, 81, 85).[3]

After several checks had been issued by the Government for the transportation of several groups of the Gold Star Mothers and Widows, calculated at the full fare amount for one-way travel, the finance officer of the War Department questioned the propriety of settling for the transportation without allowance being made, at the 12% discount rate provided in the tariff, for the trips made out of season, and requested that

[3] All the berths here involved were above the minimum.

petitioner correct the *per capita* fares on off-season sailings in accordance with its tariff (R. 56–57). When this was not done, the Government finance officer on October 27, 1930, notified petitioner that $77,908.26 was being deducted from its bills to cover the discount which should have been given (R. 66). This deduction was made up of $17,953.80, the discount on round-trip voyages made entirely out of season, and $59,954.46, the discount at 12% on the tariff rate for the off-season half of round-trip voyages made half in and half out of season.

Petitioner brought suit in the Court of Claims to recover the deduction (R. 1, 66). After a trial before a commissioner, and argument before the court below on exceptions to the commissioner's report, the court below held that under the terms of the contract and petitioner's tariff, the Government was entitled to the discount claimed and had never waived such right (R. 69–72). The petition seeks review solely of that part of the decision below which permits a discount on the out-of-season half of the voyages.[4]

ARGUMENT

Although the agreement involved was ambiguous, the Court of Claims properly held that the parties intended that the off-season discount should apply

[4] The petition states that the Government's right to a discount on voyages made entirely out of season is no longer questioned (Pet. 6).

to the off-season half of a round-trip voyage made half in and half out of season, as well as to the combined rates for voyages made wholly out of season. Furthermore, the question is peculiar to this case and is of no general importance; consequently, it does not warrant review by this Court.

1. The disputed provision in the 1930 tariff states that "Round trip rates apply during 'off-season'" and are "made by deducting 12% from combined Eastbound and Westbound fares." While this language is susceptible of being limited to voyages made wholly out of season, it does not necessarily exclude voyages of which half fall in off-season. And the circumstances surrounding the incorporation of that provision in the tariff make it plain that its application to the off-season half of the trip was proper. The Trans-Atlantic Conference of which petitioner was a member decided in 1929 to institute round-trip rates with a reduction of 10% from the combined one-way fares for travel during the off-season (R. 86), and its minutes provided that if the "passenger travels one way during the off season and one way during the summer season, the reduction of 10% will be allowed on the off season one-way fare" (R. 87). Likewise, petitioner's letter of June 19, 1929, the first step in the agreement of March 31, 1930, on which the instant suit is based, advised the Government that "If travel is one way in off-season and one

'way in height of the season, the 10% reduction is applicable on one-half of the fare" (R. 26). While both of these statements were made in reference to the 10% discount in effect in 1929, they are equally pertinent to the 12% discount offered in 1930, since the record shows that the only differences between the two discounts were their rate and the slightly different seasonal periods during which they applied (R. 85, 89). There is no support for petitioner's contention (Pet. 7, 9) that the 1930 tariff impliedly eliminated the discount on voyages made only partially out of season; such a change would scarcely have been left to implication, in the face of the Trans-Atlantic Conference minutes providing specifically for the availability of the reduction when the passenger traveled only one way during the off-season (R. 87).

Even conceding that the language of the 1930 tariff admits of the construction urged by petitioner, the square ambiguity created by the circumstances surrounding its promulgation must be resolved against the carrier, since tariffs susceptible of two meanings should be construed most favorably to the shipper. *United States* v. *Gulf Refining Co.*, 268 U. S. 542; *Atlantic Coast Line Railroad Co.* v. *Atlantic Bridge Co.*, 57 F. (2d) 654 (C. C. A. 5); *Union Wire Rope Corp.* v. *A. T. & S. F. Ry.*, 66 F. (2d) 965 (C. C. A. 8); *Chicago & Northwestern Ry. Co.* v. *Wilcox Co.*, 68 F. (2d) 883, 885 (C. C. A. 7). Indeed, the court

below considered that plaintiff had "admitted * * * that the term 'tariff rates' [as used in the agreement of March 29, 1930, between petitioner and the Government], without more, means the one-way fares shown on the [1930] tariff less the discount provided therein for 'off-season' travel" (R. 71).[5]

In any event, in the light of the negotiations preceding the contract for transportation, and the minutes of the Trans-Atlantic Conference at which the discounts were first authorized, it cannot be said that there is any clear and convincing evidence which requires a construction contrary to that given below. Cf. *Klamath Indians* v. *United States,* 296 U. S. 244, 252–253.

2. The conclusion of the court below is not open to attack on the ground that the construction given the disputed provision of the tariff was set forth in the opinion and not in the findings of fact (cf. Pet. 7). The interpretation of such a writing is a judicial rather than fact-finding function (*Hamilton* v. *Insurance Company,* 136 U. S. 242; *Great Northern Railway* v. *Merchants Elevator Company,* 259 U. S. 285, 290–291), and the opinion rather than the findings is an appropriate medium for expressing it. See *United States* v.

[5] The absence of detailed evidence as to the similarity between the 1929 and 1930 tariffs, results from the fact that there was no real dispute below as to this point, petitioner arguing in the main that the deductions provided for in the tariff were rendered inapplicable by the agreement between the parties.

Esnault-Pelterie, 299 U. S. 201, 205. Besides, the findings of fact are sufficient to compel a decision of the issue in favor of respondent (see Statement, *supra*). Cf. *United States* v. *Pugh,* 99 U. S. 265, 269; *Botany Mills* v. *United States,* 278 U. S. 282, 290; *United States* v. *Esnault-Pelterie, supra,* 206.

CONCLUSION

The decision below is correct. Moreover, the facts are unique, and no question of general importance is presented. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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